Supreme Court, U.S.
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89- 1706

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1989

I-POINT AB
and
PK BANKEN,

Petitioners

v.

ZETA ASSOCIATES,
I-POINT TECHNOLOGIES, LTD.,
ARTHUR J. GAJARSA
and
SILVESTER DE THOMASIS

Respondents

On Writ of Certiorari from the
United States Court of Appeals
for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the defense of improper venue (because of an arbitration clause in the pertinent contract) available to Appellees (Defendants below) at the time of their initial pleading, in accordance with F.R.C.P. 12(g), and, therefore, waived under F.R.C.P. 12(h) when it was not pled initially?

2. In enforcing the said arbitration clause, was it proper for the trial court to dismiss the case, rather than staying it pursuant to 9 U.S.C. Section 3?

3. Was it proper for the Court of Appeals to grant a motion for summary affirmance under the circumstances of this case?

LIST OF PARTIES

All of the parties to the proceedings below are named in the caption of the case appearing on this petition.

Appellant I-Point AB is a Swedish corporation formerly engaged in the manufacture and distribution of biochemical indicators of deterioration in perishable goods. It is currently under the supervision of a trustee appointed by the Swedish Bankruptcy Court at Malmo, Sweden. I-Point AB is a subsidiary of Appellee I-Point Technologies, Ltd.

Appellant P K Banken is a Swedish banking corporation engaged in, inter alia, commercial lending. It has no subsidiaries which are not wholly owned.

The Appellees include a District of Columbia partnership, Zeta Associates, and

a Delaware corporation with its principal office in the District of Columbia, I-Point Technologies, Ltd. Other than as noted above with respect to Appellant I-Point AB, counsel for Appellants is aware of no subsidiaries of either of these appellees.

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OPINIONS RENDERED BELOW

The case was decided by the United States District Court for the District of Columbia, on a motion to dismiss and a motion for reconsideration. Its unpublished opinions and orders of November 17, 1988, and June 26, 1989, are appended (App. iv, xvi).

The case was decided on appeal by the United States Court of Appeals for the District of Columbia Circuit, on a motion for summary affirmance. Its unpublished opinion and order of January 24, 1990 is appended (App.ii).

JURISDICTION OF THIS COURT

Appellants seek review of the said opinion and order of January 24, 1990, of the United States Court of Appeals for the District of Columbia. No other orders of

the said Court of Appeals are pertinent to this petition.

This Court has jurisdiction to review the said order and opinion of January 24, 1990, under 28 U.S.C. 1254(1).

PROVISIONS OF RULE AND STATUTE WHICH ARE AT ISSUE

Federal Rules of Civil Procedure

Rule 12. Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on Pleadings.

(a) (not applicable).

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter,

(2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which

relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) through (f) (not applicable).

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted,

except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an

objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Title 9 of the United States Code

Section 3. Stay of proceeding where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding

is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such aribtration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

Invoking jurisdiction pursuant to 18 U.S.C. Section 1964(c) (RICO), 28 U.S.C. Section 1331 (federal question),28 U.S.C. 1332 (diversity of citizenship), and pendant jurisdiction, Appellants (hereinafter "Plaintiffs") sued Appellees (hereinafter "Defendants") in the United States District Court for the District of Columbia, alleging various causes of action arising out of a series of

contracts, which were described in detail in the complaint (although copies of the written portions of the contracts were not attached to the complaint). The written portion of one of these contracts contained a clause which called for the arbitration in Sweden of any controversies arising from such contract. There were no contracts between the parties other than those described in the complaint.

Defendants moved for dismissal under F.R.C.P. 9(b) for lack of particularity in the allegations of fraud and under F.R.C.P. 12(b), raising various defenses, but not raising the defense of improper venue based on the said arbitration clause. Copies of the written portions of the contracts described in the complaint were also sought by the Defendants.

However, such copies had been provided to defense counsel prior to the filing of these initial motions to dismiss, and one of such counsel had corresponded with Plaintiffs' counsel and referred to having read the document containing the arbitration clause.

Plaintiffs obtained leave to amend and filed a First Amended Complaint, which addressed the F.R.C.P. 9(b) motion and included copies of the contracts described in the initial complaint.

Defendants again moved for dismissal under F.R.C.P. 12(b), citing the same defenses as before, but adding improper venue based on the said arbitration clause. In reply, Plaintiffs contended that the defense of improper venue had been waived under F.R.C.P. 12(h), inasmuch as the Defendants had actual knowledge of

the existence of the arbitration clause and its being a part of the contracts described in the initial complaint.

In this regard, such prior possession of the document containing the arbitration clause was described to the trial court, without contradiction by defense counsel. The Defendants argued that they should not be charged with knowing that the clause was available to them as the basis for a defense, because the written portions of the contracts were not attached to the initial complaint. The trial court accepted the latter theory and ruled that the defense had not been waived (App. xi).

The trial court ruled that the venue was improper, because of the arbitration clause, and that the matter was to be arbitrated in Sweden. The case was then dismissed.

Plaintiffs moved for reconsideration, noting, inter alia, that if the case was to be referred for arbitration, 9 U.S.C. Section 3 required that it be stayed, rather than dismissed. Notwithstanding, the trial court denied the motion, keeping its dismissal of the case intact. The request for a stay rather than a dismissal was not addressed by the trial court in its opinion (App. xviii).

The case was appealed to the United States Court of Appeals for the District of Columbia Circuit, which granted a motion for summary affirmance, citing the opinions of the trial court (App. ii).

This petition ensued.

SUMMARY OF ARGUMENT

1. Inasmuch as Defendants had actual knowledge of the content of the

arbitration clause in question, and that it was a part of the contracts sued upon, their failure to plead improper venue as a part of their initial response under F.R.C.P. 12(b),(g) constituted a waiver of such defense, pursuant to F.R.C.P. 12 (h).

2. 9 U.S.C. Section 3 requires that, where the controversy is referred to arbitration, the pending suit is to be stayed, rather than dismissed.

3. The decisions of the trial court on the issues before the Court of Appeals were not so clearly correct as to warrant disposition of the appeal on a motion for summary affirmance.

ARGUMENT

1. Waiver of defense of improper venue. In ruling that the defense of improper venue, based on the said

arbitration clause, was not available to the Defendants because copies of the contracts described in the initial complaint were not attached thereto, the trial court elevated form over substance. The facts before the trial court showed, without contradiction, that (i) defense counsel had read the clause, and (ii) it was clear that the clause was a part of the contracts described in the complaint, the latter being the only contracts between the parties in existence. Thus, it was clear to the trial court that the Defendants had actual knowledge of the arbitration clause and its applicability. For the trial court to rule that the defense was not available to the Defendants in the face of uncontradicted evidence of actual knowledge of the existence and applicability of the

arbitration clause is contrary to the letter and spirit of F.R.C.P. 12(h).

This Court should grant a writ of certiorari because, with respect to the elevation of form over substance by the trial court, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceeding which calls for the exercise of this Court's power of supervision.

2. Dismissal rather than stay. The clear requirement of 9 U.S.C. Section 3 is that the case was to be stayed, rather than dismissed. The language is unambiguous, and its requirement for a stay is mandatory. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604 (Tex. App. 14 Dist. 1984), cert. denied, 469 U.S. 1127 (1985), reh. denied, 470 U.S. 1024 (1985).

That the arbitration is to be held in a foreign country does not diminish or negate the statutory requirement for a stay. Ford Motor Co., Ltd. v. M/S Maria Gorthon, 397 F.Supp. 1332 (D. Md. 1975).

This Court should grant a writ of certiorari because, with respect to the unexplained disregard by the trial court of the statutory requirement for a stay, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceeding which calls for the exercise of this Court's power of supervision.

3. Use of summary affirmance. As can be seen from the foregoing argument, the use of summary affirmance was improper, because the decision of the trial court was not so clearly correct as to allow the court to forego the usual decision-making

process. Sills v. Bureau of Prisons, 761 F.2d 792 (D.C. Cir. 1985).

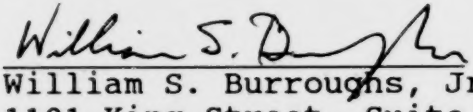
This Court should grant a writ of certiorari because, with respect to its disposition of this case on a motion for summary affirmance, the Court of Appeals has so far departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision.

CONCLUSION

The relief sought by the Plaintiffs is (i) an order instructing the United States District Court for the District of Columbia to vacate its orders of November 17, 1988, and June 26, 1989, and stay the case pending resolution of the referral to arbitration, there being clear error in the failure to comply with the pertinent

requirement of 9 U.S.C. Section 3, or in the alternative, remand to the United States Court of Appeals for the District of Columbia Circuit for consideration of the latter issue; and (2) remand to the said Court of Appeals for consideration of whether the trial court ruled properly with respect to Plaintiffs' contention that the defense of improper venue was waived under F.R.C.P. 12(h).

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7175 September Term, 1989

C.A. No. 87-03415

I-POINT AB, et al,

Appellants

v.

ZETA ASSOCIATES, et al.

BEFORE: Ruth B. Ginsburg, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto and the reply, it is

ORDERED that the motion be granted substantially for the reasons stated by the district court in its orders filed November 18, 1988, and June 26, 1989. It is

FURTHER ORDERED that appellees' request for attorneys' fees and costs be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I-POINT AB, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 87-3415
	)	
ZETA ASSOCIATES, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

Plaintiffs, a Swedish corporation, I-Point AB (IPAB), now in bankruptcy proceedings in Sweden, and a Swedish banking corporation, PK Banken, filed this breach of contract[1] action in the District of Columbia Federal District Court. Defendants are Zeta Associates, a District of Columbia partnership, I-Point

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[1]Plaintiffs filed a seven count complaint including allegations of civil RICO violations, actual and constructive common law fraud, civil conspiracy, breach of fiduciary duty, and breach of contract.

Technologies, Ltd. (IPT), a Delaware corporation with its principal place of business in Washington, D.C., and two individual defendants, Arthur Gajarsa and Silvester De Thomasis, partners in Zeta Corporation and the principals of IPT.

On July 15, 1981, defendant Zeta Associates and Mr. Kjell Blixt, a Swedish citizen and a non-party to this action, signed a Memorandum of Understanding. Under the terms of this agreement Zeta Associates agreed to form a corporation, IPT, to purchase IPAB's stock held by Mr. Blixt. Subsequently, a contract was signed on August 15, 1981 between IPT, the newly formed corporation, and Mr. Blixt. According to plaintiffs, Zeta was to fund IPT in the amount of $3,000,000. In turn, IPT was to finance IPAB in the same amount. Allegedly Zeta ceased funding

this enterprise on January 1, 1985. IPAB and PK Banken filed suit on December 16, 1987. Rather than answer plaintiffs' complaint, defendants immediately filed a Motion to Dismiss. Plaintiffs responded with a Motion for Leave to Amend the Complaint which was granted by this court. Once again, defendants filed a Motion to Dismiss, this time claiming, inter alia, that the court must dismiss this action for improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure. For the following reasons this court agrees, and dismisses this case for improper venue.

The forum selection clause in the IPT contract is clear and unambiguous and requires that disputes arising under that contract be submitted to arbitration in

Sweden. The germane clause, paragraph 10.5 of the contract states:

> In case of dispute between the parties as to the interpretion or performance of this Agreement, or any provisions hereof, such dispute shall be submitted to arbitration in accordance with Swedish law relating to arbitration. The proceedings shall be held in Malmo (Sweden) and in the English language. The decision of the arbitrators shall be final and may be enforced by any judicial tribunal having jurisdiction.

Defendants contend, and the court agrees, that the forum selection clause, calling for arbitration in Sweden, is prima facie valid and should be enforced unless the agreement was "{a}ffected by fraud, undue influence, or overweening bargaining power" or that enforcement is "unreasonable under the circumstances." The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); see Scherk v. Alberto-Culver, 417 U.S. 506 (1974) (holding that

concerns for international comity and respect for the capacities of foreign tribunals require enforcement of arbitration and forum selection clauses); Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985) (holding that "a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions" is "reinforced by the emphatic federal policy in favor of arbitral dispute resolution").

Plaintiffs allege in conclusory terms that the IPT contract was fraudulently induced, and, therefore, plaintiffs are not bound by the arbitration clause.[2] Since plaintiffs admittedly are not parties to the contracts at issue, they

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[2]As defendants have pointed out, plaintiffs have failed to allege their allegations of fraud "with particularity" as required by Rule 9(b), Fed.R.Civ.P.

assert their authority not to be bound by the arbitration clause as third party beneficiaries of both contracts. The court agrees with the basic proposition that a real party in interest to a contract is not bound by a contract if it was induced by fraud. However, the substantive rights of third party beneficiaries are grounded in the contracts themselves. The forum-selection clause provides that contractual disputes must be determined in accordance with Swedish law at arbitration proceedings in Malmo, Sweden. If the court had determined on the basis of the expansive pleadings that the contracts together with the forum-selection clause were induced by fraud, it would have refused to enforce it. However, plaintiffs have not properly alleged that the contracts containing the

forum clause were the product of fraud or coercion, and, therefore, the court finds the clause to be enforceable. See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

Plaintiffs' principal objection to the enforcement of the forum-selection clause is that defendants waived their objection to the Swedish arbitration because they failed to present it at the earliest opportunity.[3] See Rule 12(g),(h) Fed.R.Civ.P. A defendant is required to raise the defense of improper venue either in its answer or in a timely motion to dismiss. See Friedman v. World Transportation, Inc., 636 F. Supp. 685, 688 (N.D. Ill. 1986). However, a party can raise an omitted ground if he or she

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[3]Defendants chose to file a Motion to Dismiss rather than an Answer in response to plaintiffs' complaint.

acts promptly and before the court rules on the original motion. Id. Defendants' original Motion to Dismiss demanded a copy of the contract alleged to be the basis of the complaint and moved for a more definite statement of allegations. Plaintiffs were given leave to amend their complaint and attached copies of two contracts to the amended complaint. First Amended Complaint, Exhibits A and B. This was the first time that defendants were formally advised of the particulars of the contracts sued upon and they promptly filed their defense of improper venue.

Alternatively, IPAB and PK Banken argue that litigating in Sweden is unreasonable. None of these arguments have merit. Courts consider enforcement of a forum selection clause 'unreasonable' if its enforcement would deprive a party of "its

day in court." The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972). In support of its claim that enforcement of the arbitration clause would be unreasonable under the circumstances plaintiffs offer two arguments. First, plaintiffs assert that the essential 'witnesses'[4] in this case "strongly desire the case to be heard in this court because of the need to enforce any award by a Swedish arbitration panel. This suggests that the court may maintain simultaneous jurisdiction during arbitration proceedings in Sweden. However, in this country, a "district court's jurisdiction

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[4]Of the eight witnesses deemed by plaintiffs to be "essential," four reside in Sweden, one in Switzerland, and three in the united States. Note also that the 'unreasonableness' standard applies only to real parties in interest, not witnesses, and both plaintiffs reside in Sweden.

is limited to proceedings before it." In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 205 (1987) ("The concept of shared jurisdictions is both illusory and unrealistic. {P}arties cannot simultaneously submit to both jurisdictions...."). Id. Having dismissed this case for improper venue, and presuming that arbitration will go forward in Sweden, this court will have the opportunity at the award-enforcement stage to insure that plaintiffs' concerns are addressed. See Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 638 (1985). Moreover, it is well-settled in American jurisprudence that a foreign judgment will be enforced unless it is violative of state or federal public policy. Id. at 631; see Tahan v. Hodgson, 662 F.2d 862 (D.C. Cir. 1981).

Second, plaintiffs contend that "a proceeding in this court" would be "less cumbersone" because defendants do not speak Swedish. However, paragraph 10.5 of the contract reveals that the Swedish arbitration proceedings will be conducted in English. The court finds, therefore, that neither ground, taken singly or together, presents sufficient evidence to warrant a finding of unreasonableness.

Obviously, plaintiffs are entitled to initiate proceeding in Sweden. Plaintiffs contend, and we have no reason to doubt, that defendants have rejected pre-suit attempts to arbitrate this contract in Sweden. However, the court does not find that these assertions provide sufficient reason to override the parties' freely-

negotiated contract.[5] Therefore, in consideration of the reasons stated above, the court holds that plaintiffs' breach of contract claim should be dismissed for improper venue. The court also finds that Counts I through VI (civil RICO and contract-related tort actions) must also be dismissed because they 'arise' from the same transaction and should follow the principal case to Sweden.[6]

It is, therefore, this 17th day of November, 1988

ORDERED that defendants' Motion to Dismiss for Improper Venue is granted.

/s/
JOHN H. PRATT
United States District Judge

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[5]Whether or not defendants will now be amenable to arbitration in Sweden is irrelevant. We merely hold that the arbitration clause is binding on the parties, thereby depriving this court of subject matter jurisdiction.

[6]In view of this disposition it is not necessary to address defendants' other defenses.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I-POINT AB, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil Action
	)	No. 87-3415
	)	
ZETA ASSOCIATES, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

Plaintiffs, I-Point AB and PK Banken, move for reconsideration of this court's November 17, 1988, order dismissing the above-referenced action for improper venue. Once again plaintiffs' motion is grounded on allegations of fraud in the inducement of a contract and on an alleged inability to proceed with arbitration in Sweden.

The court reiterates that plaintiffs' failure to allege that the forum/arbitration clause was itself the product of fraud in the inducement prohibits this court from entertaining this action. Southland Corp. v. Keating, 465 U.S. 1, 11 (1984); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). Plaintiffs' general allegations of fraud in the inducement of the contract as a whole are questions "for the arbitrators and not for the courts." Prima Paint, 388 U.S. at 400.

The court also finds plaintiffs' unending attempts to convince the court that arbitration is beyond their financial and legal reach completely speculative and unpersuasive. The court takes judicial notice that one of the movants, plaintiff PK Banken, is a highly solvent

international financial institution. In any event, it is simply irrelevant under the Breman's "unreasonableness" analysis for plaintiffs to assert that the costs of the arbitration proceeding in their chosen forum are prohibitive. Nor do plaintiffs convince the court that the bankruptcy activities currently proceeding in Sweden would bar arbitration of the contract at issue. The court, therefore, denies plaintiffs' Motion for Reconsideration of its finding of improper venue. See Commerce Consultants Intern. v. Vetrerie Riunite, 867 F.2d 697 (D.C. Cir. 1989).

It is, therefore, this 26th day of June, 1989

ORDERED that plaintiffs' motion is denied.

/s/
JOHN H. PRATT
United States District Judge